No. 91-1229

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA, by and through INTERNAL REVENUE SERVICE,

Petitioner,

v.

BRUCE J. McDERMOTT and BETTY McDERMOTT, ZIONS FIRST NATIONAL BANK, N.A.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT ZIONS FIRST NATIONAL BANK, N.A.

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STATUTORY PROVISIONS INVOLVED

In addition to those statutory provisions cited by Petitioner (hereinafter "IRS"), the following is offered:

1. Utah Code Annotated § 78-22-1 (1992 Repl.) provides:

> From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from

execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. . . .

STATEMENT OF THE CASE

1. Prior to August 21, 1981, Bruce J. McDermott and Betty B. McDermott ("McDermott") were the owners of fee simple title to certain real property located in Salt Lake City, Utah (hereinafter the "Property"). On or about August 21, 1981, McDermott as "Seller", entered into a Real Estate Contract with third parties, as "Buyer" for the sale and purchase of the Property. To secure in part the Buyer's obligation under the Real Estate Contract, McDermott accepted from the Buyer a Note and a Trust Deed on the Property securing said Note with Buyer's interest in the Property, notwithstanding the fact that legal title to the Property remained vested in McDermott.[1] (Pet. App. 3a-4a, 17a).

[1] Throughout its Brief, beginning in paragraph 1 of its Statement, the IRS attempts to resurrect the issue of the personalty character of McDermott's interest in the original Real Estate Contract. Although it acknowledges the fact that both the District and Tenth Circuit courts specifically held that through express agreement, the IRS had consensually waived its rights to the personalty as collateral (IRS Brief pp. 4-5, n. 2) and professes not to seek "further review of the lower courts' interpretation of that agreement" (*Id.*), the IRS has expended considerable effort to review facts otherwise irrelevant to this appeal. Notwithstanding the acknowledgement of the irrelevance of the personalty collateral issue to the narrowly framed question preserved, because of the inclusion of that issue in the IRS Brief, Zions will include such facts and argument as are necessary to respond to the IRS argument.

2. On June 22, 1987, a Judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, against McDermott and in favor of Zions First National Bank (hereinafter "Zions") in the amount of $67,977.67 together with post-judgment interest and attorneys fees, which Judgment was duly docketed with the Salt Lake County Clerk on July 6, 1987 in Book 213 as Entry No. 2402 and immediately became a valid lien against all of McDermott's real property and after-acquired property located in that county. (Pet. App. 2a, 17a; J. App. 26).

3. On September 9, 1987, a Notice of Federal Tax Lien Under Internal Revenue Service was filed with the Salt Lake County Recorder's Office alleging an unpaid tax liability of McDermott in the amount of $103,657.93 which immediately upon filing also became a general lien against all of McDermott's real property and after-acquired property located in that county. (Pet. App. 2a, 17a; J. App. 27).

4. As a result of an eventual breach of Buyer's default in the payment obligations of the Real Estate Contract and the Note, McDermott commenced a power of sale foreclosure on the Property, the actual Trustee's Sale for which occurred on September 23, 1987. The high bidder at the Trustee's Sale was McDermott, who repurchased the Property with a credit bid. (Pet. App. 4a, 17a-18a).

5. Following the Trustee's Sale, negotiations were pursued between Zions and the IRS concerning the respective priorities of their competing lien claims against the Property and potential sales proceeds therefrom. Ultimately, in contemplation of a pending sale of the Property by McDermott to independent parties (hereinafter "Hansons"), a written Escrow Agreement (hereinafter the "Agreement") was prepared memorializing a consensual ordering of the priorities of the respective lien claims of Zions and the IRS as applicable to the proceeds. (J. App. 17-25). The Agreement, dated March 4, 1988, and executed by McDermott, Zions and the IRS, contains the following negotiated language:

3. It is understood that the releases delivered herewith by the IRS and Zions are unconditional. The monies placed in escrow shall be in lieu of all legal or equitable rights of the IRS and Zions to the real property released by them as part of this agreement. Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property. *The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of collateral.*

(J. App. 20, ¶3 (emphasis added)).[2]

6. Concurrently with the execution of the Agreement and in compliance with the provisions thereof, Zions executed a Partial Release of its Judgment Lien and the IRS executed a Certificate of Discharge, both particular to the Property and which were delivered to the escrow agent, to facilitate the obtaining of title insurance. (J. App. 20, ¶¶4 and 5).

7. Also concurrently with the execution of the Agreement and pursuant to its terms, McDermott sold the Property to Hansons, the net proceeds of which totaled $135,575.50 and were paid into the Third District Court of Salt Lake County, State of Utah, together with the filing of a Complaint for Interpleader by McDermott commencing this action. (J. App. 9-16).

8. The suit was removed from the state court to the United States District Court for the District of Utah on motion of the IRS. (Dist. Crt. R. 1). Zions and the IRS thereafter filed Motions for Summary Judgment, each asserting that it was entitled to satisfy its lien from the proceeds first. (Dist. Crt. R. 3 and 7). In a Memorandum

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[2] In paragraph 2 of its Statement, the IRS asserts that "the IRS and the Bank released their claims on the real property but reserved their rights to the cash proceeds of the sale." In addition to the irrelevant nature of that assertion for the reasons discussed in note 1, above, the IRS has misread the Agreement. The language cited in the paragraph 3 of the Agreement specifically orders the "priorities of the parties to the cash proceeds." There is no mention in the Agreement of any reservation of prior rights to the personalty proceeds. The lower courts found none that would preserve the claim of the IRS thereto and the IRS apparently does not contest that finding.

Decision and Order, dated January 17, 1989, (Pet. App. 16a-24a) granting summary judgment in favor of Zions, the Honorable J. Thomas Greene held that the Agreement had reordered the priorities of the competing liens as against the proceeds to be identical to the respective priorities of the liens as they existed against the real property interest of the Property immediately following the Trustee's Sale.[3] (Pet. App. 21a). The District Court further held that between the two simultaneously attaching liens, Zion's judgment lien enjoyed a priority over the IRS tax lien because of its earlier date of docketing. (Pet. App. 22a-23a).

9. Pursuant to an appeal by the IRS, the Tenth Circuit Court of Appeals reviewed and upheld the decision of the District Court. (Pet. App. 1a-15a). The Tenth Circuit affirmed the finding that the Agreement had consensually resolved any issues as to the validity and real property character of the competing liens. (Pet. App. 6a-7a). Following *United States v. Vermont*, 377 U.S. 351 (1964), it further held that Zions' judgment lien was "non-contingent," had obtained choate status prior to the

[3] Before the Trustee's Sale, neither Zions nor IRS held any interest in the real property character of the Property. Prior to their repurchase of the Property at the Trustee's Sale, McDermott held only a personalty interest in the contract rights of the Real Estate Contract. *Cannefax v. Clement*, 818 P.2d 546 (Utah 1991); *Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah 1987); *Butler v. Wilkinson*, 740 P.2d 1244, 1254 (1987). The real property interest remained in the Buyer by equitable conversion through the Real Estate Contract. Only upon purchase by McDermott of the Property at the Trustee's Sale were the liens of Zions and the IRS able to attach specifically to the real property interest of McDermott in the Property.

filing of the tax lien, and thus was entitled to priority as to the proceeds from the sale of the Property. (Pet. App. 12a). The fact that the specific Property was obtained by McDermott subsequent to the perfection of both the judgment lien and the tax lien did not affect the choateness of those liens which, being general in nature, applied to *all* of McDermott's real property located in Salt Lake County. (*Id.*)[4]

SUMMARY OF ARGUMENT

A judgment lien in Utah is a general lien automatically perfected against all real property owned by the judgment debtor located in the county in which the lien is properly docketed. Utah Code Annotated § 78-22-1 (1992 Repl.) A federal tax lien similarly is effective against all real property owned by the taxpayer immediately upon the filing of the Notice of said lien with the appropriate County offices. 26 U.S.C. §§ 6321, 6323. Both liens enjoy automatic attachment rights as to all real property

[4] Contrary to the assertions of the IRS (IRS Brief p. 6, note 3), the Tenth Circuit distinguished rather than rejected the opinion of the Fifth Circuit in *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (1983). The Fifth Circuit had found that competing liens of the IRS and a private secured creditor were in fact filed and perfected simultaneously. Because neither was placed in record before the other, that Court ordered a sharing of the proceeds of the sale of the property in proportion to their respective claims. The Tenth Circuit distinguished this case for the obvious reason that Zions' judgment lien was perfected over two months prior to the filing of the IRS's tax lien. (Pet. App. 13a-14a).

acquired by the debtor/taxpayer after the perfection of the liens in the county where the liens are of record. *Glass City Bank v. United States*, 326 U.S. 265, 268 (1945).

The federal law used to determine contests between competing liens is "first in time is first in right." *United States v. City of New Britain*, 347 U.S. 81, 85 (1954). In order to be recognized in a lien contest with a federal tax lien, the competing judgment lien must be choate, or "perfected in the sense that there is nothing more to be done." *Id.* at 84. The fact that the judgment lien is general in nature and not specific as to any particular parcel of real property is insignificant. *Id.* A general non-contingent lien is sufficiently choate to obtain priority over a subsequently filed tax lien. *United States v. Vermont*, 377 U.S. 351, 359 (1964).

The legislative and judicial pronouncements covering federal tax lien priorities have been shifting from the original position of protection of the secret tax lien to the recognition that all creditors of a debtor/taxpayer should be treated fairly and on an equal footing. *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 689 (5th Cir. 1983). The universal rule of "first in time is first in right" should be applied in this case to protect the prior docketing of Zions' judgment lien over the later-filed federal tax lien on all of McDermott's real property, including the after-acquired Property in question. This result would encourage the prompt filing of liens and protection of all diligent creditors including the IRS. *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 640 (S.D. Tex. 1982).

ARGUMENT

I. Zions Judgment Lien became choate prior to the subsequently filed federal tax lien.

The first issue usually to be resolved in a federal tax lien priority case is the validity and extent of the competing liens which depend upon the rights of the debtor/taxpayer to the property subject of the liens. *Aquilino v. United States*, 363 U.S. 509, 512 (1960). Those issues are to be determined by state law. *Id.* The Tenth Circuit correctly stated that in this case neither party has raised an objection to the validity of the other's general lien or to the real property character of McDermott's interest in the Property facilitating the competing liens. (Pet. App. 7a).

The respective lien claims of Zions and the IRS are based upon separate and distinct authorities. The statutory judgment lien claimed by Zions attaches to all real property owned or thereafter acquired by the judgment debtor upon the docketing of the judgment with the Clerk of the Court in the county in which the real property is located. Utah Code Annotated § 78-22-1 (1992 Repl.).[5] Pursuant to that statute, the Utah State Supreme Court has unfailingly held that the docketing of a judgment is the act which automatically creates the lien. *Orton v. Adams*, 21 Utah 2d 245, 444 P.2d 62, 63 (1968). No further act of the creditor or any judicial or administrative body is necessary. "[A] judgment automatically

[5] Effective April 27, 1992, the Utah State legislature repealed the former § 78-22-1 as set forth in the Statutory Provisions Involved Section, above. That section was replaced by a new statute with similar language and the identical effect as the prior provision. Utah Code Annotated § 78-22-1 (1992 Supp).

becomes a lien upon all nonexempt real property of the judgment debtor at the time it is docketed. [Creditor's] right to a judgment lien is unconditional and is not subject to alteration by a court on equitable grounds." *Taylor National, Inc. v. Jensen Brothers Construction Company*, 641 P.2d 150, 155 (Utah, 1982).

A federal tax lien claimed by the IRS may attach to all real *and* personal property of a delinquent taxpayer pursuant to 26 U.S.C. § 6321. First authorized at the close of the Civil War, the federal tax lien existed as a potent "secret lien" which, even though unrecorded, enjoyed priority over all competing liens. With the Act of March 4, 1913, ch. 166, § 3186, 37 Stat. 1016, Congress first protected judgment creditors and others against federal tax liens which had not been duly filed in a designated office.[6] In 1966, Congress passed the first major reform to the 1913 Act[7] for the express purpose of conforming "the lien provisions of the internal revenue laws to the concepts developed in the Uniform Commercial Code."[8]

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[6] See generally, Plumb, *Federal Liens and Priorities – Agenda for the Next Decade*, 77 YALE L.J. 228, 229 (1967) and Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L.Rev. 724 (1965) for the historical significance of the Federal Tax Lien Act of 1966.

[7] Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 101, 80 Stat. 1125.

[8] In his speech proposing passage of the 1966 Act, Representative Mills remarked: "The major provisions in this bill are designed to protect creditor's rights. . . . One of the things we were concerned about is that there are so many innocent people who are unaware of any possibility of a tax lien." Also rising in support of the bill was Representative Byrnes: "The intent of these amendments as they relate to the priority of federal liens is to promote equity and facilitate commerce by making the legal rules governing tax liens more certain and fair." United States Congressional Record – House, September 12, 1966, pp. 22,226 and 22,227.

Although effective as of the date of the tax assessment, the priority of the tax lien as against competing claimants including judgment lien creditors is now based upon the date that the Notice thereof is filed with the appropriate county recorder.

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

26 U.S.C. § 6323(a). In this case, where the IRS consensually waived its lien against the personalty intents in the Real Estate Contract, the only property being claimed under the general tax lien is all of the real property located in Salt Lake County and owned by the delinquent taxpayer – the identical Property claimed by Zions.

By common law, the first lien of record against a debtor's property has priority over those subsequently filed unless a lien-creating statute clearly shows or declares an intention to cause the statutory lien to override.[9] Now known as the universal rule of "first in time is

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[9] This principle, denoted the "cardinal rule," was laid down by Chief Justice Marshall in *Rankin & Schatzell v. Scott*, 25 U.S. (Wheat) 177, 179 (1827): "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds unless the lien be intrinsically defective. . . . "

the first in right," this doctrine has been the subject of frequent reliance by this and other federal courts (*United States v. City of New Britain*, 347 U.S. 81, 85 (1954); *Merger v. United States*, 375 U.S. 233, 236 (1963); *United States v. Equitable Life Assurance Society*, 384 U.S. 323, 327 (1966)) and by Congress in the enactment of federal tax lien legislation (*United States v. City of New Britain*, 347 U.S. at 85).

It is equally well settled that federal law determines the priority between federal tax liens and state created or authorized liens. *United States v. Equitable Life Assurance Society of the United States*, 384 U.S. at 328 (1966). Under current Section 6323(a) of the Internal Revenue Code, a judgment lien creditor is granted priority over a competing federal tax lien when the judgment lien is perfected or "choate" prior to the filing of the Notice of Tax Lien. *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954). *United States v. Pioneer American Insurance Company*, 374 U.S. 84, 88 (1963). Whether or not a judgment lien is choate is also a federal question. *United States v. Security & Savings Bank, Executor*, 340 U.S. 47, 49-50 (1950). This Court has historically required "the identity of the lienor, the property subject to the lien, and the amount of the lien" to be established in order for the lien to be classified as "choate." *City of New Britain*, 347 U.S. at 84; *Spokane County v. United States*, 279 U.S. 80 (1929). This same requirement has been adopted into the IRS regulations for purposes of the application of 26 U.S.C. § 6323(a).

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established.

26 C.F.R. § 301.6323(h)-1(g).[10]

The purpose of the choateness doctrine as applied to federal tax liens is to protect the uniform standard of the federal liens. "Otherwise a State could affect the standing of federal liens contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc. is determined." *United States v. City of New Britain*, 347 U.S. at 86. This Court has consistently held that in order to be choate, a lien must have achieved a condition of finality as to fact and amount.[11] Balancing against the judicial policy requiring the choateness is the expressed legislative and judicial intent to protect creditors from secret tax liens and promote equity among competing lien creditors

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[10] As found by the District Court, the definition of "judgment lien creditor" as used in 26 U.S.C. § 6323(a) and set forth in 26 CFR § 301.6323(h)-1(g) "clearly" includes the judgment lien of Zions as docketed (Pet. App. 22a-23a, note 7).

[11] See *United States v. Acri*, 348 U.S. 211 (1955) (attachment lien was found "inchoate" because the validity of the lien and the amount secured thereby was contingent) and *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950) (attachment lien found to be essentially a *lis pendens* requiring further proceedings to perfect the lien and therefore inchoate).

of the debtor's assets.[12] One of the purposes of the Federal Tax Lien Act of 1966 was "to treat the government like any other creditor." *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 689 (5th Cir. 1983).

The IRS argues that Zions' judgment lien, being general in nature, could not have achieved choateness until the purchase of the Property by McDermott and the simultaneous attaching of the competing liens specifically thereto. This argument disregards the clear intent of Congress and the prior declarations of this and other federal courts. Section 6323 limits the priority of the federal tax lien by declaring the same to be invalid as against a judgment lien creditor "until notice thereof . . . has been filed." Therefore, the completion or docketing of any qualified judgment lien prior to the filing of the tax lien endows that judgment lien with priority. The fact that a judgment lien is general in nature (as opposed to being specific as to any particular parcel of real property) has no significance. *United States v. City of New Britain*, 347 U.S. at 84.

In *United States v. Vermont*, 377 U.S. 351 (1964) this Court was asked by the IRS to declare that a state-created lien, generally enforceable against all of the debtor's property, lacked the choateness to entitle it to priority over a subsequently filed federal tax lien. This Court observed that the extent of the state lien was identical to that of the federal tax lien and that absent special rules from Congress, the basic rule of "first in time, first in

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[12] See note 8, *supra*.

right" would apply. In dealing with the issue of a specificity of the requirement for the identifying of property subject to the state lien, the Court held that a general lien over all of the debtors property "is sufficiently choate to obtain priority over the later federal lien." *Id.* at 359.

Vermont has been cited and followed by circuit and district courts for the proposition that a non-contingent general lien on all of a person's real property is "choate" and if so perfected prior to the federal tax lien, will take priority over the federal lien,[13] regardless of whether after-acquired property is involved.[14]

By execution of the Agreement, Zions and the IRS stipulated that their respective claims to the Hanson sale proceeds would be determined solely by their respective priority claims as against the real property interest in the Property at the moment of the purchase of same by McDermott. Zions' judgment lien had, on July 6, 1987, become non-contingent and choate.[15] The amount of the lien, the identity of the debtor, and the fact that the lien was fixed upon all McDermott's real property located in Salt Lake County, had been determined. Nothing more

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[13] See e.g., *Donald v. Madison Industries, Inc.*, 483 F.2d 837, 841 (10th Cir. 1973); *In the Matter of Thriftway Auto Rental Corp.*, 457 P.2d 409, 413 (2nd Cir. 1972).

[14] See e.g., Pet. App. 10a; *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982); *Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wisc. 1986); Plumb, FEDERAL TAX LIENS 134-35 (3rd ed. 1972) ("the typical general judgment lien on 'all' the debtor's real property seems safe from later tax liens").

[15] Utah Code Annotated § 78-22-1 (1992 Repl.).

was required of Zions to further perfect its lien.[16] Similarly, the IRS general tax lien became perfected on September 9, 1987 as to all real property then or thereafter owned by McDermott. The nature of McDermott's interest in the Property remained personalty (outside of the reaches of either IRS or Zions stipulated liens) until the Trustee's Sale on September 23, 1987 at which time McDermott acquired the Property reuniting the legal and equitable interests. At that moment, pursuant to the express terms of the Agreement, both Zions' judgment lien and the IRS tax lien immediately and simultaneously attached specifically to the Property.

II. Having obtain choate status prior to the filing of the federal tax lien, Zions' judgment lien is entitled to priority on the after-acquired Property.

The issue of priority of liens simultaneously attaching to after-acquired property of a debtor has resulted in an evolution of case law through continued analysis over the past 41 years. Resort to the Tax Code on this particular issue has not been determinative. "Section 6323 certainly was not enacted to decide dead heats among racing lien holders." *Texas Oil & Gas Corporation v. United States*, 466 F.2d 1040, 1052 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973).

Apparently, first discussed theoretically in *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), *aff'd sub nom, California v. United States*, 195 F.2d 530 (9th Cir. 1952), *cert. denied*, 344 U.S. 831 (1952), the analysis was

[16] *United States v. City of New Britain*, 347 U.S. at 84.

prefaced by that court's remarks: "The determination of this question is not necessary to the decision in this case." However "assuming arguendo" that the claimant competing with the federal tax lien had a valid lien, that court surmised without citation to any authority, that a federal tax lien would be superior to any simultaneously attaching interest of another party. 96 F. Supp. at 321. *Graham* was thereafter favorably cited again in dictum and without statutory or other authority, in several cases cited by the IRS in its Brief.[17] In these cases, the court actually found that the claimant competing with the federal tax lien had failed to perfect its lien and was therefore subordinate and junior to the IRS. Resolution of the ultimate issue of simultaneous attachment was not necessary nor made the subject of serious analysis.

The first known reported case to wrestle with the issue directly was *Iowa Fair Plan v. United States*, 257 N.W.2d 626 (Iowa 1977). There, in a five to four split decision, the court held that because a first-filed state lien attached simultaneously with a federal tax lien on after-acquired property of the borrower, it failed to become choate "before the tax lien."[18] *Id.* at 629. Accordingly, it

[17] *United States v. Meyer*, 346 F. Supp. 554 (S.D.N.Y. 1972); and *MDC Leasing Corp. v. New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978).

[18] Neither Section 6823 nor *United States v. City of New Britain*, 347 U.S. 81 (1954) contains language requiring either the attachment or perfection of a competing lien "before the tax lien." Rather, it provides that the tax lien lacks validity until the filing of the appropriate notice. Simultaneous attaching is not addressed in the statute nor has it been the subject of this Court's opinion. Even assuming that the state lien lacked

presented the federal tax lien with ultimate priority without any cite to statutory authority for the elevating decree.

The next discovered case on point began the movement to analyze the respective rights of the competing lien claimants in light of this Court's acknowledgment of the "first in time rule." In *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979), various state, city and federal tax liens were filed against the taxpayer, all prior to their purchase of certain personal property. By statute, each of the tax liens covered after-acquired property. The IRS argued that based on the dicta of *Graham*, the IRS should receive priority status notwithstanding the simultaneous attaching of the tax liens upon the purchase by Fleming of the property. The same district which had previously cited *Graham* favorably[19], now disapproved of its sweeping reasoning, limited it to its facts, and declared that the state liens enjoyed an equal footing with the IRS liens.

The Federal District Court in Texas made the earliest comprehensive analysis of the after-acquired property issue in *McAllen State Bank v. Saenz*, 561 F. Supp. 636 (S.D. Tex. 1982). In a case remarkably similar to the present matter, that court was required to determine the relative priorities of a federal tax lien and a judgment lien to the

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choateness until that lien specifically attached to the property in question (which assumption Zions vigorously disputes), the construction of the statute by the *Iowa Fair Plan* Court was neither required nor justified by statutory or case precedent.

[19] *United States v. Meyer*, 346 F. Supp. 554 (S.D.N.Y. 1972); *MDC Leasing Corp. v. New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978).

proceeds of a foreclosure sale of after-acquired real property. As is the law in Utah, a judgment lien in Texas is perfected as to all real property situated in the county in which the judgment is indexed or docketed. The Court acknowledged that both judgment and tax liens attach to after-acquired property, and cited *United States v. Vermont*[20] in deciding that the competing liens, although general in nature, were both choate and properly perfected. 561 F. Supp. at 639. *Graham* was discarded on its facts with no deference to its unsupported dicta. The doctrine of pro rata distribution of simultaneously attached property set forth in *Fleming* was cited as being in accord with Texas law. Nevertheless, inasmuch as the determination of tax lien priorities is governed by federal law,[21] the federal rule of "first in time, first in right" required the court to order the first payment of proceeds to satisfy the first lien of record even though both lien claimants preceded the purchase of the property by the debtor. In analyzing the policy implications for its holding, the Court declared: "This rule encourages the diligent filing of liens whether or not after-acquired property is involved." *Id.* at 640.

Taking the opportunity to review the relevancy and reliability of most of the above-cited cases, the Wisconsin District Court encountered the same issue in *Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wisc. 1986). Narrowly limiting *Graham* and its progeny to their specific facts, that Court rejected the notion that on the issue of simultaneously attaching liens, "tie goes to the federal

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[20] 377 U.S. 351 (1964).

[21] *Aquilino v. United States*, 363 U.S. 509, 512-513 (1960).

government." 640 F. Supp. at 414. Finding "no legal or policy reason that would mandate a deviation" from the "first in time, first in right rule," the Court ordered that the funds on deposit be paid as against the numerous pre-acquisition liens in the order of their perfection.

The Fifth Circuit Court took the opportunity to review this issue while addressing the issue of competing lien claims which were perfected simultaneously against property of a debtor. In *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983), the Court refused to follow the rule of *MDC Leasing, supra*, that any competing lien simultaneously attaching with the tax lien lacked choateness prior to attachment and was therefore inferior. It recognized that one of the purposes of the Federal Tax Lien Act of 1966 was "to provide some limited but specific relief from the harshness of the choateness rule."[22] *Id.* at 689. To the extent that § 6323 provides an unambiguous answer to federal tax lien priority questions, choateness requirements were found to be "supplanted." In further discussion of the purpose of the 1966 Act, the Court declared:

> In our view, another aspect of choateness that no longer floats, although concededly not specifically addressed by § 6323, is the notion that a tie goes to the government. To the extent that the purpose of the Federal Tax Lien Act was to conform tax liens to Article 9 security interests, *the way to achieve this goal is to treat the government like any other creditor*. Giving the government's filed tax lien priority over a

[22] *Rice Investment Co. v. United States*, 625 F.2d 565, 569 (5th Cir. 1980).

> simultaneously recorded security interest would defeat this goal. We do not believe that is what Congress intended.

711 Fed.2d at 689 (emphasis added). The Fifth Circuit recognized the legislatively initiated evolution in case law which has removed the unauthorized ultimate-priority demanded by the IRS in favor of the treatment of lien claims on equal footing.

The present case, most factually similar to *McAllen State Bank*, was properly resolved below in conformance with that opinion as confirmed by *Bar Coat Blacktop*. Zions' judgment lien was choate and perfected as to all real property then and thereafter owned by McDermott at the date of docketing. Nothing further was required of Zions to attach the non-contingent lien on after-acquired property. Utah Code Annotated § 78-22-1 (1992 Repl.). Likewise, the federal tax lien was choate and perfected as to all real property then or thereafter owned by McDermott as of September 9, 1987. *Glass City Bank v. United States*, 326 U.S. 265, 268 (1945). Both liens having attached specifically to the Property simultaneously, the federal rule of "first in time, first in right" must apply to the time of perfection or choateness of the respective liens. Zions' lien was properly accorded priority over the IRS's subsequently filed lien. *United States v. Vermont*, 377 U.S. 351 (1964); *United States v. City of New Britain*, 347 U.S. 81 (1954).

CONCLUSION

Based on the foregoing analysis, the Court should affirm the Order of the Tenth Circuit Court of Appeals.

Respectfully submitted.

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